181 (2)

No. 10-1174

In The

Supreme Court of the United States

VERONICA ALVAREZ,

Petitioner,

v.

DES MOINES BOLT SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioner has presented a compelling reason to grant the Petition where:

1. The Eighth Circuit's opinion affirming the District Court's rigorous analysis of Petitioner's evidence does not conflict with a decision of this Court or any Court of Appeals, and where Petitioner does not demonstrate that the Eighth Circuit's Ruling implicates an important federal question that has not been settled by this Court.

2. The Eighth Circuit's Ruling correctly held, both on the record before it and under the applicable prima facie elements for a hostile environment claim alleging sex discrimination, that Petitioner's two pre-2006 oral complaints of sexually oriented remarks by a co-worker did not amount to actionable sex harassment such as would require "prompt remedial action" by Respondent.

3. The Eighth Circuit correctly upheld the District Court's analysis of the record to the effect that, even if Petitioner's January 10, 2006, oral complaint when combined with her subsequent written complaint, are assumed to have implicated an actionable hostile environment claim, Respondent nevertheless took proper remedial action when it promptly investigated the complaints, issued discipline after the investigation, and subsequently transferred the alleged perpetrator so that he never harassed Petitioner again.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Des Moines Bolt Supply, Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner has presented no "compelling reason" for her Petition for a Writ of Certiorari ("Petition") to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eighth Circuit's November 17, 2010, Opinion is in conflict with any decision of this Court or another Court of Appeals, or that the Eighth Circuit decided an important federal question that has not been settled by this Court. See Sup. Ct. R. 10(a-c). Therefore, the Petition should be denied.

At the outset, Petitioner contends that the Eighth Circuit's Opinion "diverted from the general agreement among the remaining Circuits regarding when and how an employer must investigate and respond to employee complaints of co-worker harassment in order to escape liability under Title VII". (Petition, p. 3). However, it bears emphasis that the decision appealed from recognized the unique factual setting of this case, and the narrowness of the issues to be decided. The Eighth Circuit simply held that, with regard to Petitioner's pre-January 2006 oral complaints of alleged harassment, she could not meet her prima facie burden of establishing an "actionable" violation of Title VII such that would require the employer's "prompt remedial action". That narrow ruling does not conflict with any decision of another Circuit Court addressing the "severity" and "pervasiveness" element of the prima facie burden.

With regard to Petitioner's argument that the decision below conflicts with other Circuit Court

decisions, Petitioner erroneously misconstrues the substance of the Eighth Circuit's decision. As seen above, the Court simply held that a reviewing court need not reach the "prompt remedial action" analysis if the plaintiff fails to establish that the conduct complained of rose to the level of an "actionable" Title VII violation. None of the Circuit Courts disagree with that analysis. And, the Eighth Circuit's interpretation of when the employer's duty to "investigate and remedy" begins is consistent with the law of all of the other Circuit Courts – that duty commences in situations where the complained of conduct is not trivial or minor, but rather involves "actionable" harassment violating Title VII. As such, the Eighth Circuit's decision on that issue creates no Circuit Court split.

Finally, Petitioner's argument that employers should have the duty to investigate even minor "non-actionable" complaints of harassment is misplaced, and ignores this Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). Under Petitioner's view, this Court should require employers to "foresee" situations that might later escalate into actionable harassment, and also require them to prevent that "possibility" from occurring. In other words, under Petitioner's view it will be mandatory for employers to promptly investigate and, if necessary, remedy, every complaint of alleged harassment whether "actionable" or not. To date, no Circuit Court has ruled in the manner urged by Alvarez.

Simply put, Petitioner has failed completely to carry her burden of demonstrating that there are

compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

In an attempt to induce this Court's review, Petitioner has offered a highly glossed and sanitized version of the underlying facts. Yet, even if one were to accept her misguided contention that the decision below "contravenes the basic nature of the negligence standard articulated by this Court" and "stands in irreconcilable conflict" with decisions of the other Circuits, it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle to review the issue raised. Thus, as Sup. Ct. R. 15.2 requires Respondent to point out to the Court any perceived misstatements of fact contained in the underlying Petition, Respondent will focus on the insufficiencies in that recitation, citing to the underlying opinions of the Eighth Circuit and the District Court.

Summary

Though Alvarez neglects to mention it in her Petition, her suit initially brought four separate and distinct claims under Title VII which she claims arose from her employment at Des Moines Bolt Supply, Inc., as follows:

1. That she was subjected to sex harassment by co-employee Brad Nurnberg.

2. That after complaining of sex harassment by Nurnberg, she was subjected to illegal retaliation, namely a five day work suspension.

3. That after serving her suspension she was subsequently subjected to sex harassment by other co-workers (not Nurnberg).

4. That as a result of the alleged sex harassment perpetrated upon her, she was subjected to a "constructive discharge" from her job.

Through her Petition Alvarez attempts to "resurrect" only her first claim alleging a sexually hostile environment involving co-worker Nurnberg, which she claims rose to the level of "actionable" harassment such as to require a "prompt remedy" by Respondent. As Alvarez notes, both the District Court and Eighth Circuit dismissed that claim as legally insufficient. What Alvarez fails to reveal in her Petition, and what she does not appeal from, are those Court's dismissal of her three other claims alleging retaliation, post-suspension sex harassment, and constructive discharge. Of course, the reason Alvarez makes no mention of those claims is because the record made clear that she could not establish the essential elements of any of those claims.

Factual Record

The record below showed that Alvarez was employed in the Kit Department of Des Moines Bolt Supply's Des Moines plant sorting nuts and bolts from February 19, 2001, until her resignation on May 2, 2006. On two occasions in the fall of 2005 she registered oral complaints with her supervisor, Jay Owens, that a co-worker named Brad Nurnberg had made sexual comments to her. Petitioner admits that "after Alvarez's first complaint about verbal conduct, Owens told Nurnberg to stop". (Petition, p. 5). She also admits that, after her second complaint to Owens about additional sexual remarks by Nurnberg, "Owens again told Nurnberg to stop". (Petition, p. 6). In addition to warning Nurnberg, Owens also told his manager, Dave Norem, about Nurnberg's remarks. Thereafter, Norem also spoke with Nurnberg about his conduct. (Petition, p. 31a).

In her District Court Petition, Alvarez claimed that beginning in September 2005 she kept a journal in which she recorded incidents of allegedly sexually offensive conduct by co-workers. And, while Alvarez makes a number of allegations about Nurnberg's conduct at pp. 4-5 of her Petition, she fails to mention one key fact: namely, that while she allegedly "documented" her allegations in her journal, she never provided Respondent's representatives with the journal so as to enable them to become aware of her complaints. Indeed, Alvarez never revealed her journal until after she filed suit against Respondent. As a result, whatever allegations Alvarez lists at pp.

4-5 of her Petition, the fact remains that she did not make Respondent aware of the majority of her complaints until after litigation began. Indeed, the District Court noted that while "Alvarez alleges that she kept a detailed journal in which she recorded the date and particulars of many harassing incidents", she "did not include them in her written complaint or tell anybody about them". (Petition, p. 33a).

As Alvarez admits, by the beginning of 2006 the most that can be said about her situation is that she had registered two separate oral complaints to her supervisor about sexual comments by Nurnberg, and on both occasions the supervisor (Owens) warned Nurnberg and told him to cease his comments. Hence, the record is clear that DMB did not "bury their heads in the sand" and ignore the situation, as Petitioner baldly states (Petition, p. 7); nor does the record show that DMB acted as if it were "free to do nothing with absolutely no risk if the conduct is technically not 'actionable'". (Petition, pp. 14-15). Most certainly, DMB did not condone "a one free bite rule", as Petitioner suggests. (Petition, p. 16). Indeed, for Petitioner to claim that the Eighth Circuit's Ruling ignored the "negligence standard articulated by this Court" (Petition, p. 16) contradicts what the record below truly shows; namely, that DMB (through Owens) acted promptly on Alvarez's initial complaints.

Alvarez also admits that she made no more complaints until January 10, 2006, when she "complained a third time to Owens". (Petition, p. 6).

During the intervening months, the record below showed that Alvarez regularly lunched with Nurnberg, her alleged tormentor. (Petition, p. 35a). On January 10, 2006, Alvarez orally complained to Owens that Nurnberg had slapped her buttocks. As noted by the District Court, in response Owens asked Alvarez what she wanted him to do. (Petition, p. 31a). Alvarez requested that Owens watch Nurnberg and, if the "slapping" occurred again, to confront him about it.

Apparently, no more "slapping" occurred thereafter. However, on January 19, 2006, Alvarez claims Nurnberg called her a "dumb-ass". (Petition, p. 32a). The next day, she complained to her new supervisor, Clint Jubell, about the comments and that she felt Nurnberg was harassing her. In response, Jubell requested that Alvarez put her complaint in writing. While Alvarez's Petition claims "Jubell asked Alvarez on the spur of the moment to draft a written complaint" describing her allegations (Petition, p. 6), the record shows that Alvarez was given sufficient time to draft her complaint; in fact, she was not given any timetable at all to submit it to Jubell.

Subsequently, Alvarez gave her written complaint to Jubell later that day. In it, she registered only the following complaints:

1. That Nurnberg had occasionally slapped her on the buttocks.

2. That Nurnberg had made sexual comments to her.

3. That Nurnberg had made 1-2 sexual advances to her.

4. That Nurnberg had handed out a "joke flyer".

After receiving the written complaint, DMB immediately began to investigate Alvarez's allegations. The company assigned both Jubell and Operations Manager Michael Thompson to conduct the investigation. Both Alvarez and Nurnberg were orally interviewed during the investigation. And, though Alvarez never mentions it in her Petition, Thompson and Jubell also interviewed numerous other employees who worked in the Kit Department with Alvarez and Nurnberg.

During the investigation, Nurnberg admitted making "off-colored jokes" but denied Alvarez's other complaints. He also described a mutual "butt slapping" game between himself and Alvarez, and also claimed that Alvarez had made sexual comments to him. Alvarez, on the other hand, repeated her complaints against Nurnberg and denied doing anything inappropriate.

As noted at the outset of this Brief, Alvarez's failure to adequately portray the record below, as well as her complicity in the very conduct she complained of, makes this case a particularly poor vehicle for the Court to decide the issue posed. Indeed, though Alvarez makes no mention of it, three separate witnesses stated that they had seen both Alvarez and Nurnberg engage in mutually inappropriate conduct;

specifically, that Alvarez had also engaged in dirty joke-telling, "smacking of buttocks", and off-colored comments. (Petition, pp. 5a, 34a-35a).

After the interviews were completed, Thompson prepared a written report of the investigation. That report concluded that "taking into account the statements of other employees" it appeared "both employees engaged in behavior and conduct that is strictly and specifically prohibited by DMB Supply company policy"; namely, "verbal and physical conduct of a sexual nature". (Petition, p. 6a). Though Alvarez's Petition asserts it was only Nurnberg who "claimed that Alvarez had engaged in a buttocks-slapping game with him" (Petition, p. 6), she again misrepresents the record: as noted by both the District Court and the Eighth Circuit, three separate witnesses aside from Nurnberg implicated Alvarez in the very type of activity she was complaining of. As stated above, those witnesses reported that Alvarez had made "dirty jokes", engaged in "smacking buttocks", and made "off-colored" comments.

After the investigation was complete, Thompson and Jubell discussed their findings with company President Wayne Simmer and Treasurer Gary Beane. While Alvarez baldly claims "that Wayne Simmer . . . made the decision to suspend Alvarez" (Petition, p. 7), she again misrepresents the record. As noted by the District Court, "Simmer authorized Thompson and Beane to deal with the situation", and "those two decided that a suspension was appropriate" for both Alvarez and Nurnberg. (Petition, p. 37a). As seen,

despite Alvarez's misrepresentations to the contrary, the record is clear that Thompson and Beane were responsible for making the decision to suspend Alvarez and Nurnberg.

Since both Alvarez and Nurnberg were implicated in the conduct complained of, each was suspended from work for five days. In addition, Nurnberg was transferred to a new job in a different department where he would have no contact with Alvarez. Though Alvarez neglects to mention it, it is undisputed that after his transfer Nurnberg had no further contact with her, and she admits he never harassed her again. (Petition, pp. 6a, 37a-38a). Therefore, it is undisputed that the formal investigation that Respondent undertook after receiving Alvarez's written complaint had the effect of ending the alleged harassment by Nurnberg. (Petition, pp. 55a-56a, with District Court noting that "DMB's investigation and remedial action ultimately stopped the source of the complained harassment").

So if one summarizes Alvarez's misrepresentations/less than candid portrayal of the record it reveals:

1. Despite Alvarez's claims otherwise, after her first two oral complaints about Nurnberg, Supervisor Owens did react quickly, confronted Nurnberg, and orally warned him about making further sexual remarks.

2. Alvarez neglects to mention that DMB's formal investigation into her written

complaint concluded, based upon the statements of three co-workers, that Alvarez was also guilty of the sexual conduct she complained of.

3. That, despite her representations to the contrary, it was not company President Wayne Simmer who decided to suspend her – as noted by both the District Court and the Eighth Circuit, that decision was made by Operations Manager Thompson and Supervisor Jubell.

4. Alvarez also neglects to mention that after Respondent conducted its investigation into her written complaint, the end result was that Nurnberg was disciplined, transferred, and never harassed her again.

After Alvarez's return from her five day suspension on February 8, 2006, she claims "other male co-workers began to sexually harass" her and "she resigned due to the continued harassment in May, 2006". (Petition, p. 6). What Alvarez neglects to mention, however, is that she never reported any of those alleged incidents to any supervisor or management representative of DMB. In fact, Alvarez admitted that, prior to the filing of her suit, Respondent was completely unaware of her post-suspension allegations since she did not follow the harassment policy in the company's Employee Handbook and notify her superiors of the alleged harassment. (Petition, pp. 22a, 38a, 56a).

Alvarez continued working at DMB until April 29, 2006. In late April 2006 she told certain co-workers that she was going to leave DMB to start a food-vending business. She told another employee she planned to quit her job when her daughter's baby was born. Alvarez was scheduled to work on May 1, 2006, but called DMB and left a message stating her daughter was having pregnancy complications and she needed to stay with her. She then failed to show for any of her shifts thereafter. Instead, on May 4, 2006, DMB received a resignation letter from Alvarez stating she was resigning due to alleged sexual harassment. With her letter, Alvarez attached a list referencing her allegations.

Even though Alvarez had already resigned her job, Operations Manager Thompson nevertheless conducted an investigation into her new allegations. In that investigation, however, no other employee corroborated Alvarez's claims; instead, certain employees told Thompson of Alvarez's statements that she was planning to quit DMB to either open a food-vending operation or help her pregnant daughter. With no supporting evidence, Thompson concluded that he could not corroborate any of Alvarez's harassment allegations.

As noted, Alvarez's Title VII suit raised her initial claim of sexual harassment involving Brad Nurnberg, as well as claims for retaliation, post-suspension sexual harassment, and constructive discharge. The District Court dismissed all four claims as legally insufficient, and the Eighth Circuit affirmed. In her Petition to

this Court, Alvarez seeks only to resurrect her initial sex harassment claim involving Nurnberg.

In a comprehensive and well-reasoned opinion, the Eighth Circuit held, with regard to the sex harassment claim involving Nurnberg, that Alvarez's pre-January 2006 oral complaints "did not amount to actionable sexual harassment" such as would require Respondent to take "prompt remedial action" to cure the situation. (Petition, pp. 18a-19a). And, with regard to Alvarez's oral complaint of January 10, 2006, and her subsequent written complaint nine days later, the Eighth Circuit held that even if those complaints involved "actionable harassment" Respondent's "response was sufficient to avoid liability". (Petition, p. 20a). For those reasons, the Court dismissed Alvarez's sex harassment claim involving Nurnberg.

In her Petition, Alvarez incorrectly states the Eighth Circuit decided "DMB was not liable for a failure to take prompt and remedial action in response to" her complaints involving Nurnberg because the alleged incidents before January 10, 2006, "did not create a hostile environment". (Petition, p. 7). Alvarez misstates what the Eighth Circuit actually held. The Court never held that the previous warnings issued to Nurnberg by Supervisor Owens constituted a "failure to take prompt and remedial action" after Alvarez's initial oral complaints. In fact, the Eighth Circuit never addressed that specific question. Rather, addressing only the narrow issue of Alvarez's burden to establish each of the elements of her prima

facie claim, what the Court did hold was that she could not establish a key element of her prima facie burden which precedes any analysis of the "proper remedial action" element; namely, she could not establish that the pre-January 10, 2006, conduct involved acts that rose to the level of "actionable harassment" violating Title VII. (Petition, pp. 18a-19a). As such, what the Eighth Circuit actually held was that "the company is not liable under Title VII *regardless* of whether DMB took prompt remedial action after Alvarez's initial complaints". (Petition, p. 19a) (emphasis added).

Clearly, the Eighth Circuit simply correctly held that an employer's duty to investigate and take proper remedial action is not triggered when the complaints involve alleged conduct that is not "actionable harassment" violating Title VII. That ruling is consistent with this Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). And, with regard to Alvarez's January 10, 2006, complaint, and her ensuing written complaint, the Eighth Circuit correctly held that "DMB's response was sufficient to avoid liability". (Petition, p. 20a). As seen hereafter, the Eighth Circuit's careful resolution of those narrow issues implicates no circuit split and hardly "will further inhibit women from pursuing their right to a harassment-free work environment". (Petition, p. 15).

REASONS FOR DENYING PETITION

The case described in Alvarez's Petition bears little resemblance to the case actually litigated and decided by the Courts below. While the Petition describes a path-marking and conflict-creating decision of the Eighth Circuit, in reality that Court simply issued a well-reasoned affirmance of the District Court's Order using long-established "hostile environment" case law. Rather than wading into any circuit splits, the Eighth Circuit carefully decided very narrow issues which in no way implicate the problems suggested in Alvarez's Petition.

Indeed, the Eighth Circuit correctly focused first on the narrow question of whether Alvarez's pre-January 10, 2006, oral complaints involved conduct recognized as "actionable" sex harassment violating Title VII, noting that "prompt remedial action" by the employer was required only if the conduct complained of was "actionable". (Petition, p. 17a). After reviewing the facts, the Court correctly determined that, even in the light most favorable to Alvarez, the pre-January 10, 2006 conduct did not rise to the level of actionable sex harassment violating Title VII and, as such, Respondent was not liable "regardless of whether DMB took prompt remedial action after Alvarez's initial complaints". (Petition, p. 19a). With regard to the oral complaint of January 10, 2006, and the written complaint submitted by Alvarez nine days later, the Court held that, assuming such complaints rose to the level of an actionable hostile environment "DMB's response was sufficient to avoid liability". (Petition, p. 20a).

Despite Alvarez's suggestion, neither Ruling evidences a split with any *like* decision of any other Circuit Court.

As will be seen below, once it is clear that the Eighth Circuit addressed only narrow non-controversial issues the cases Petitioner cites easily distinguish themselves. Indeed, the decision below simply comports with long established case law recognizing that an employer's duty to take "prompt remedial action" is not implicated when the acts alleged do not involve an "actionable" hostile environment. Simply put, as all Circuit Courts hold, in the absence of conduct creating an actionable hostile environment claim, the "prompt remedial action" requirement imposed on employers is not implicated.

A. The District Court's decision, affirmed by the Eighth Circuit, correctly held that Alvarez's two pre-2006 oral complaints of sexually oriented remarks by a co-employee did not amount to "actionable" sex harassment such as would require "prompt remedial action" by Respondent and, as such, implicates no Circuit Court split.

In her Petition, Alvarez essentially seeks to rewrite long-established case law concerning a plaintiff's burden of establishing a prima facie case of a sexually hostile environment. It appears to be her goal to have this Court impose upon employers a duty to effectuate "prompt remedial action" even

where the conduct complained of does not amount to "actionable" harassment violating Title VII. According to her Petition, employers should have the "duty to prevent harassment from becoming a hostile work environment", (Petition, p. 13), even in situations where the conduct alleged is minor and does not rise to the level of "actionable" harassment. In doing so, Alvarez not only "puts the cart ahead of the horse"; she also ignores long-standing precedent of this Court concerning the importance of the term "sexual harassment".

Indeed, Alvarez attempts to lump all allegations of "harassment", however trivial or isolated, into the term "sexual harassment". However, in doing so she fails to recognize the importance of the term "actionable harassment" in the course of defining the employer's duty. Simply put, not every allegation of harassment will implicate a Title VII violation. Indeed, this Court in *Oncale*, 523 U.S. at 81, emphasized requirements "that prevents Title VII from expanding into a general civility code", stating that:

> " . . . The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the conditions of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview. We have always regarded that requirement as crucial . . . "

Clearly, only a few years ago this Court expressly recognized the distinction between complaints of

non-actionable harassment as opposed to those complaints that do involve harassing conduct sufficient to violate Title VII.

As noted previously, the Eighth Circuit simply held, in line with long-established case law, that with regard to Alvarez's pre-January 2006 oral complaints the "prompt remedial action" element of the prima facie case did not need to be analyzed since the conduct alleged did not rise to the level of "actionable" sex harassment. As noted by the District Court, the step-by-step prima facie requirements in a sexual harassment "hostile environment" claim requires a plaintiff to show, in order, that: (1) plaintiff belonged to a protected group; (2) plaintiff was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of that plaintiff's employment; and (5) when the harasser is a co-employee, that the employer knew or should have known of the harassment and did not take proper remedial action. (Petition, p. 46a).

In the ruling appealed from, the Eighth Circuit recognized that in a "hostile environment" claim the plaintiff's first burden is to establish that the alleged conduct involves "actionable" harassment, and that only when that burden is met do courts move on to address the additional element regarding the employer's duty to promptly investigate and take remedial action. In other words, the "investigative" and "remedial" analysis takes place only in situations where actionable harassment is involved.

Alvarez's argument would essentially have this Court ignore the methodology of proof stated above and require "proper remedial action" by employers regardless of whether the plaintiff satisfied elements (2), (3), and (4) of the prima facie case. In other words, her argument asks this Court to impose upon employers the duty to take "prompt remedial action" against alleged harassers even in situations where the conduct in question does not meet the definition of "harassment" enunciated in *Oncale* and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370 (1993).

No Circuit Court requires employers to take "prompt remedial action" when the conduct alleged does not rise to the level of "harassment" recognized by this Court as an actionable Title VII violation. In fact, all of the Circuit Courts, including the decisions cited in Alvarez's Petition, only impose the "prompt remedial action" requirement upon employers for conduct that rises to the level of "actionable" harassment violating Title VII. No Circuit Court holds that employers must remedy minor complaints that do not constitute actionable harassment simply because there might be subsequent complaints involving acts that do rise to that "actionable" level. Certainly, no Circuit Court holds that employers have a duty to investigate and remedy minor acts of non-actionable harassment so as "to affirmatively prevent harassment from becoming an actionable hostile work environment", as Petitioner argues. (Petition, p. 16).

Here, both the District Court and Eighth Circuit held that, with regard to the pre-January 2006 oral complaints by Alvarez, there was nothing in the record to indicate the complained-of behavior of Nurnberg was so frequent or severe that a reasonable person in Alvarez's position would consider her work environment hostile or abusive. Similarly, the Courts held that the record demonstrated that Nurnberg's alleged behavior had no effect on Alvarez's ability to perform her job. Certainly, there was no showing that Nurnberg's comments rendered Alvarez unable to fulfill her job duties. As such, both Courts, with good reason, deemed the pre-January 2006 complaints to not involve conduct sufficient to create an "actionable" sexually hostile environment. In this regard, the decisions are entirely consistent with *Oncale*.

In the decision below, the Eighth Circuit noted the appropriateness of the analysis of the First Circuit in a similar "hostile environment" claim brought under Title IX. (Petition, p. 17a). That decision, *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 67 (1st Cir. 2002), held: "In the absence of conduct creating a sex-based hostile educational environment, laxity on the part of school officials in investigating an incident is not actionable under Title IX". See also *Karibian v. Columbia University*, 930 F.Supp. 134, 147 (S.D.N.Y. 1996) ("If what occurs is an employer's failure to investigate and take remedial measures in response to a complaint of discrimination [based upon Title VII], and if it turns out that no actual discrimination has occurred, then there is nothing which

actually constitutes any conduct banned by the statute.").

Petitioner's argument, that employers should be forced to investigate and promptly "remedy" all allegations of sex harassment regardless of whether the conduct rises to the level of the type of harassment which violates Title VII, would have the effect of nullifying this Court's warning in *Oncale* and would require employers to enforce the "civility code" rejected in that decision. Try as she might, Petitioner cannot cite to a single Circuit Court ruling that stands in contrast to the Eighth Circuit's ruling here and holds that employers have a duty to take "prompt remedial action" even in situations where the conduct at issue is not "actionable". See *E.E.O.C. v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 505 (6th Cir. 2001) (holding that "a failure to remedy complaints of sexual harassment that doesn't rise to the level of gender discrimination is not actionable under Title VII").

Simply put, there is no conflict among the Circuit Courts on the specific issue addressed by the Eighth Circuit here; namely, that Alvarez's pre-January 2006 oral complaints did not involve conduct that rose to the level of "actionable" sex harassment violating Title VII such as to require Respondent to effectuate "prompt remedial action". That being the case, it is clear that Petitioner failed to establish a primary element of her prima facie case, and as such she has failed to show any compelling reason for this Court to review the decisions below.

B. The Eighth Circuit's decision does not create a Circuit Court split regarding the duty of employers in situations where the plaintiff's allegations do not involve actionable harassment violating Title VII.

With much hyperbole claiming the decisions appealed from permit "employers to effectively bury their heads in the sand about claims involving allegations of non-actionable sex harassment", Petitioner erroneously claims that the Eighth Circuit's decision "conflicts with the longstanding view of the negligence standard [imposed upon employers] used in other Circuits". (Petition, p. 9). That argument amounts to an exercise in semantics. As seen hereafter, what has actually occurred is that while the Circuit Courts impose the same essential requirements upon employers in situations where the conduct alleged involves "actionable" harassment, they have tended to describe those requirements in slightly different terms.

According to Alvarez, the Eighth Circuit's Ruling refuses to impose upon employers the duty to "make a reasonable inquiry into the details of the harassment and take measures to prevent it from worsening", and as such "conflicts with the longstanding view of the negligence standard used in other Circuits". (Petition, p. 9). Once again, she fails to note the importance this Court has placed upon the term "sexual harassment". Simply put, as seen in Division A above, when the acts in question do not rise to the level of "actionable

harassment" violating Title VII, then, despite Petitioner's claims to the contrary, employers have no duty to "make a reasonable inquiry into the details of the harassment and take measures to prevent it from worsening". (Petition, p. 9). No Circuit Court takes such a position.

Rather, what every Circuit Court that has decided the issue holds is that when a complaint involving *actionable* sex harassment by a co-employee is made, the standards are as follows: the employer first must be made aware of the conduct, and then must take prompt and appropriate steps to remedy the actionable harassment. For example:

a. As Alvarez states, the Eighth Circuit's standard is that once "the company knows or should have known of the conduct" it must "show that it took immediate action and appropriate corrective action". (Petition, p. 9). As stated in *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999), a plaintiff must show the employer "knew or should have known about the harassment and failed to take prompt remedial action reasonably calculated to stop the harassment".

b. Phrasing the requirements slightly differently, the Seventh Circuit's standard requires employers "to take reasonable steps to both discover (become aware of) and rectify (take corrective action) acts of sexual harassment of its employees". (Petition, pp. 9-10).

c. The Ninth Circuit requires employers "to remedy or prevent a hostile or offensive work environment of which" the company knew; i.e., the company must first "know" of the conduct and must then "remedy" the situation. (Petition, p. 10). An "employer is liable for the hostile work environment created by a co-worker unless the employer takes adequate remedial measures in order to avoid liability". *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

d. The Tenth Circuit requires employers "to remedy or prevent a hostile or offensive work environment of which management-level employees knew". (Petition, p. 11). In other words, the company first has to "know" of the conduct, and must then take steps to remedy it (just as required by the Eighth Circuit). The analysis looks "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and preventive responses". *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001).

e. The Sixth Circuit requires employers "to take prompt and appropriate corrective action" for sexually harassing conduct that "it knew or should have known of". (Petition, p. 11). In other words, the standards are the same as those used in

the Eighth Circuit. The requirement is that "the employer both (1) knew or should have known of the harassment, and (2) failed to take prompt and appropriate corrective action". *McCombs v. Meijer, Inc.*, 395 F.3d 346, 353 (6th Cir. 2005).

f. In line with the Eighth Circuit, the First Circuit requires that employers "knew or should have known of the charged sexual harassment" and "failed to implement prompt and remedial action". (Petition, p. 12). To establish employer liability "a plaintiff must demonstrate that the employer knew or should have known of the charged sexual harassment and failed to implement prompt and corrective action". *Forrest v. Brinker Int'l. Payroll Co.*, 511 F.3d 225, 230 (1st Cir. 2007). In other words, the employer first has to "know" of the conduct, and then must take appropriate remedial action, just as in the Eighth Circuit.

Simply put, no conflict exists among the Circuit Courts which have decided the issue addressed by the Eighth Circuit here; namely, that the Court must first analyze whether a plaintiff has established the "actionable" harassment element, and only when that factor is established move on to an analysis of the "prompt remedial action" element. Indeed, the analysis of every Circuit Court is essentially the same: the Courts universally hold that in instances where employers become aware of conduct that constitutes

actionable sex harassment, they have a duty to remedy the situation. Try as she might, Alvarez is unable to support the picture she tries to paint: namely, that some Circuit Court requires employers to also promptly "remedy" minor non-actionable complaints of alleged harassment. Petitioner's far-fetched contention that the standards evidence a split among the Circuits is utterly without merit.

Further contradicting the alleged "split" among the Circuits is the fact that this Court previously noted the unanimity of views among the holdings of the Circuit Courts on the issue of judging employer liability for co-employee harassment claims. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2289 (1998), this Court noted the "even broader unanimity of views" among the Circuit Courts in "uniformly judging employer liability for co-worker harassment under a negligence standard . . . " There, after citing to decisions of the Sixth, Eleventh, Second, Ninth, Eighth, Seventh, Fifth, Tenth, Third, and First Circuits, this Court specifically stated that the issue of judging an employer's liability for co-worker harassment "is not a controversial area". *Id.* As stated in *Faragher*, all of the Circuits essentially apply the rule adopted at 29 C.F.R. §1604.11(d) (1997), whereby the "employer is liable for co-worker harassment if it knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action". *Id.* As *Faragher* noted, the Eighth Circuit has clearly adopted that

standard as well. *Id.* (citing *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996)).

Petitioner's main complaint – i.e., that with regard to Alvarez's pre-January 2006 oral complaints of alleged harassment, the Eighth Circuit did not address the "prompt remedial action" element since it determined Alvarez could not establish the prior element that the conduct alleged involved "actionable" harassment – reveals her fundamental misunderstanding of how the Circuit Courts analyze the prima facie elements of a hostile environment claim, as well as her misunderstanding of *Oncale*. Simply put, no Circuit Court has ruled in the manner urged by Alvarez: namely, that even if an employee cannot establish the first element in the prima facie burden that he/she was subjected to actionable sex harassment, the employer still has a duty to effectuate prompt and appropriate remedial action so as to prevent the alleged conduct from later "becoming a hostile work environment" actionable under Title VII. (Petition, p. 13). Indeed, the "prompt remedial action" element is not even reached if "actionable" harassment is not present. There being no "split" among the Circuit Courts on the question of an employer's duty to promptly and appropriately remedy the situation when true actionable sex harassment is established, Petitioner has failed to show any compelling reason for this Court to review this issue.

C. The hypothetical situation urged by Alvarez does not justify this Court's review.

Alvarez essentially suggests that even in situations where the conduct complained of is minor and does not rise to the level of actionable harassment recognized by this Court's *Oncale* decision, employers should nevertheless have a duty to step in and take "prompt and appropriate remedial action" so that the conduct in question does not later rise to the level of actionable harassment. In other words, Alvarez would have this Court assign employers the responsibility to "foresee" a situation that might later escalate into actionable harassment, and attempt to prevent that possibility from occurring. As stated previously, no Circuit Court has ruled in the manner urged.

Of course, Alvarez cannot state with any specificity where the employer's "duty" should begin. For instance:

1. If a co-worker "winks" at another employee, should the employer be required to step in and investigate the situation and, if appropriate, take remedial action, just because the possibility exists that the relationship between the employees might later escalate into an "actionable" harassing environment?

2. If one employee "blows a kiss" at another, does Alvarez suggest that the employer must immediately step in and investigate, and if appropriate take

remedial action, all because the possibility exists that the situation between the two might later escalate into actionable sex harassment?

3. If a male employee makes a single comment about a female co-worker's figure, must the employer be required to immediately investigate the situation and, if appropriate, take remedial action, simply because there is the chance that, at some point in the future, the male employee's conduct might escalate into "actionable" sex harassment violating Title VII?

In the hypothetical situation urged by Alvarez, employers would be required to devote the resources to investigate even minor complaints of allegedly harassing conduct, and then take appropriate remedial action, even in situations where not a single actionable harassing incident occurred. Indeed, if Alvarez's version of Title VII's requirements comes to fruition, employers will be required to investigate and remedy even trivial non-actionable complaints of harassment just because the possibility exists, however remote, that the situation might later escalate into actionable harassment. Such logic stands *Oncale* on its head. The "general civility code" feared in *Oncale* will thus be the norm, and "conduct that is not severe or pervasive", *Oncale*, 118 S.Ct. at 1003, will be clothed with Title VII protection and it will be *mandatory* for employers to promptly investigate and, if appropriate, remedy, all complaints of harassment,

whether involving "actionable" harassment violating Title VII or not. Indeed, per Alvarez's suggestion, if employers do not promptly investigate and remedy even conduct that does not cross the threshold of being actionable harassment, they may be liable simply because subsequent conduct does cross that line. The potential time bomb for employers is thereby obvious.

Since every complaint of harassment does not necessarily ground an actionable Title VII claim, the employer's duty to "investigate and remedy" should not be implicated in every situation. "The error is in concluding that all harassment of a sexual nature amounts, *ipso facto*, to gender discrimination" violative of Title VII. See *E.E.O.C. v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 521 (6th Cir. 2001). At bottom, Alvarez is contending for a rule holding that any complaint of alleged harassment, whether the conduct involves actionable harassment or not, must be timely investigated and remedied by the employer. Such a rule, of course, would place upon employers the burden of investigating and remedying each and every minor "non-actionable" claim of alleged harassment simply because the situation might later evolve into one involving an actionable hostile environment.

Significantly, Alvarez never even argues that the Eighth Circuit's ruling that her pre-January 2006 oral complaints of alleged harassment did not amount to "actionable" conduct violating Title VII was somehow incorrect and inconsistent with *Oncale* and *Harris*. Indeed, she has made no effort to address

that concern, let alone demonstrate that the Eighth Circuit's ruling on that issue was somehow in error. Rather, Alvarez ignores her prima facie burden to first establish "actionable" harassment, and simply argues that employers should have the duty to investigate and remedy each and every complaint of alleged harassing conduct, whether the allegations involve an actionable Title VII violation or not.

According to Alvarez "the ruling below is inconsistent with the employer's duty articulated by this Court to affirmatively prevent harassment from becoming an actionable hostile work environment". (Petition, p. 16). Conveniently, Alvarez fails to cite any opinion of this Court in support of her proposition. Indeed, no opinion of this Court has ever held that employers have a duty to investigate and remedy claims of non-actionable harassment simply because there is the "possibility" the situation might later escalate into an actionable hostile environment which does violate Title VII.

Petitioner badly mischaracterizes the Eighth Circuit's opinion, as well as the record below, in order to float her campaign for the new "rule" described above. Her argument stands in stark contrast to what this Court recognized in *Oncale*; namely, that not all harassment claims involve conduct severe enough to implicate a violation of Title VII. However, as noted in *Oncale*, absent a Title VII violation there is no basis for implying any liability on the employer's part. This being the unambiguous law recognized by not only the Eighth Circuit, but also by the various

Circuit Courts, Alvarez has not carried her burden of demonstrating a "compelling reason" for her Petition to be granted.

CONCLUSION

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not established her burden of demonstrating a "compelling reason" for the Petition to be granted.

Respectfully submitted,

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